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No. 03-354

In the
Supreme Court of the United States

APNA GHAR, INC.,

Petitioner,

v.

ROBERT JOHNSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APNA GHAR, INC.'S PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

Whether Congress has the authority to regulate the intrastate employment activities of a local, non-commercial, not-for-profit social services shelter under the Commerce Clause?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2 Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Apna Ghar, Inc.'s (Apna Ghar), petition for a writ of certiorari.[1] Written consent for amicus participation in this case was granted by counsel of record for all parties. Letters of consent have been filed with the Clerk of this Court.

PLF is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. In support of these fundamental principles of liberty, PLF litigates in state and federal courts across the nation.

PLF has participated in numerous cases concerning the scope of the Commerce Clause and federalism, including *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*); *United States v. Morrison*, 529 U.S. 598 (2000); *Reno v. Condon*, 528 U.S. 141 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997); and *United States v. Lopez*, 514 U.S. 549 (1995). PLF will augment the arguments of Petitioner by discussing the extent of Congress' authority under the Commerce Clause to regulate wholly intrastate activities with indirect connections to, and no substantial effect on, interstate commerce. The decision below presents this Court with one instance of a wider and dangerous trend among the federal circuits: refusal to enforce the Constitution's textual and structural limits on federal power to the detriment of

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[1] Pursuant to Supreme Court Rule 37.6, PLF affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Americans' liberty. Thus, PLF respectfully urges this Court to grant certiorari.

STATEMENT OF THE CASE

In 1989, five compassionate and enterprising women founded a walk-in shelter to serve the needs of South Asian immigrant women in Chicago's Uptown neighborhood. *Johnson v. Apna Ghar, Inc.*, 330 F.3d 999, 1000 (7th Cir. 2003). Responding to a high incidence of domestic violence and child abuse and neglect in their community, these women created Apna Ghar, Inc., to provide a shelter and social services to women reluctant or unable to avail themselves of the services of other shelters because of language and cultural barriers. *Id.*

Incorporated in Illinois as a charitable institution, Apna Ghar is exempt from federal and state taxes. Brief of Appellee (No. 01-2015) at 1-2, *Johnson v. Apna Ghar, Inc.*, 330 F.3d 999. It maintains and provides services only in Illinois; is not a commercial enterprise; places no products into interstate commerce and does not charge fees for its services. *Id.* Apna Ghar employs legal advocates to assist women with various law-related matters. *Johnson*, 330 F.3d at 1000. When it needed a new legal advocate, Apna Ghar placed an ad in the *Chicago Reader*, a free weekly newspaper distributed in the Chicagoland area. *Id.* at 1000-01.

Mr. Johnson applied for the position. *Id.* However, Apna Ghar did not interview him because it believed a woman advocate would be more effective with its clientele. *Id.* at 1001. Although Mr. Johnson could have brought a gender discrimination complaint under Illinois law,[2] he chose to file

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[2] Like federal law, Illinois prohibits unlawful discrimination in employment. The Illinois Department of Human Rights serves to investigate alleged discrimination and adjudicate such claims as Mr. Johnson's. *See* 775 Ill. Comp. Stat. 5/1-102; 5/1-103(Q); 5/2-

(continued...)

this action in federal court, alleging a violation of Title VII of the 1964 Civil Rights Act. *Id.*

The district court granted Apna Ghar's motion to dismiss for lack of subject matter jurisdiction. *Johnson v. Apna Ghar, Inc.*, No. 00C7752, 2001 WL 293134 (N.D. Ill. Mar. 23, 2001), *rev'd* 330 F.3d 999 (7th Cir. 2003). Relying on *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the district court held Apna Ghar's employment activity was not subject to federal control because it was not an employer engaged in an industry affecting commerce. *Johnson*, 2001 WL 293134, at *1. The court found Apna Ghar was not engaged in an industry affecting interstate commerce because its primary activity, operating a not-for-profit, domestic violence shelter, was conducted wholly within Illinois' borders. *Id.* In conducting its primary activity, Apna Ghar has incidental contacts with interstate commerce via the internet and telephone, and some of its donors are companies engaged in interstate commerce. *Id.* However, the district court found: "None of those things, either singly or collectively, bring Apna Ghar into the realm of " 'an industry affecting commerce.' " *Id.*

The Seventh Circuit reversed. *Johnson*, 330 F.3d at 1000. Relying on the aggregation doctrine of *Wickard v. Filburn*, 317 U.S. 111 (1942), the Seventh Circuit concluded that even though the effects of Apna Ghar's incidental activities on

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[2] (...continued)
102 (2003). The Illinois Human Rights Commission has exclusive jurisdiction over such claims. 775 Ill. Comp. Stat. 5/8-111(C) (2003). *See Maksimovic v. Tsogalis*, 687 N.E.2d 21, 24 (Ill. 1997). Apna Ghar is clearly an "employer" covered by the Illinois Human Rights Act as it employs more than 15 employees within Illinois for more than 20 calender weeks in a year. *See* 775 Ill. Comp. Stat. 5/2-101(B)(1)(a) (2003); *Johnson v. Apna Ghar, Inc.*, 330 F.3d at 1004. It appears Mr. Johnson had a perfectly viable remedy under state law for Apna Ghar's alleged violations.

interstate commerce were *de minimis*, its intrastate employment activity was subject to federal control because Congress was regulating a general class of activities under Title VII. *Johnson,* 330 F.3d at 1002-03. The court refused to apply *Lopez*'s and *Morrison*'s rule that an activity must have a substantial effect on interstate commerce in order for Congress to have the power to control it. *Id.* Instead, the Seventh Circuit held that in spite of the wholly intrastate nature of Apna Ghar's charitable services, its contacts with interstate commerce incidental to its wholly intrastate, noncommercial activity satisfied *Wickard*'s "low threshold" for federal control under the Commerce Clause. *Id.* at 1004.

SUMMARY OF ARGUMENT

In *Lopez* and *Morrison*, this Court announced in clear language that allowing federal control over wholly intrastate activities with attenuated connections to interstate commerce under the Commerce Clause would convert a limited grant of power to Congress into a general police power. However, lower federal courts continue to sanction applications of federal power to wholly intrastate conduct with attenuated effects on interstate commerce. These lower court decisions stem from the clash between *Lopez*'s and *Morrison*'s holdings and the aggregation doctrine and its associated "class of activities" rule.

On the one hand, *Lopez* and *Morrison* hold the grant of authority to Congress under the Commerce Clause is limited in order protect the liberty-preserving tension between federal and state power. On the other hand, both decisions preserved the aggregation doctrine, which sanctions seemingly *unlimited* federal control over intrastate activities, without regard for federalism. As a result, federal power over "every aspect of human existence," *Lopez*, 514 U.S. at 600 (Thomas, J. concurring), continues nearly unabated.

The Seventh Circuit has applied the aggregation doctrine to approve federal control over wholly intrastate, non-

commercial activity based solely on attenuated, incidental contacts with interstate commerce. By contrast, other federal courts focus on the activity itself, without applying the aggregation doctrine, to find federal control under the Commerce Clause would be unconstitutional. To resolve the conflict among the federal circuits and with this Court's precedent, this Court should grant the writ.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT CERTIORARI TO PLACE DEFINITIVE LIMITS ON THE USE OF AGGREGATION DOCTRINE TO UPHOLD FEDERAL CONTROL OVER WHOLLY INTRASTATE, NONCOMMERCIAL CONDUCT

The Commerce Clause grants Congress the power to regulate "commerce with foreign nations, and among the several states, and with the Indian tribes" in order to preserve the free flow of manufactured goods and other products between the states.[3] U.S. Const. art. I, § 8, cl. 3; The Federalist, No. 42 (James Madison) (Clinton Rossiter ed. 1961) at 267. In this case, the Seventh Circuit found Apna Ghar's wholly intrastate activities subject to federal control based on the most attenuated connections to interstate commerce. The court reasoned that Title VII represents a "general regulatory statute"

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[3] *See Lopez*, 514 U.S. at 590-93 (Thomas, J. concurring) (analyzing historical sources to conclude the Commerce Clause did not grant Congress the power over activities that "substantially affected" commerce); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003) (examining over 1600 appearances of the word "commerce" in the *Pennsylvania Gazette* from 1731-1800 and concluding the word was used almost constantly to refer to "trade or exchange" and routinely distinguished from intrastate activities like agriculture and manufacturing).

that bears a substantial relation to interstate commerce, and that therefore the "de minimis" nature of Apna Ghar's conduct did not matter. *Johnson*, 330 F.3d at 1003. In finding Apna Ghar's wholly intrastate conduct was within Congress' authority under the Commerce Clause, the court focused on activities incidental to Apna Ghar's primary activity—providing charitable services to abused women wholly within Illinois' borders[4]. *Id.* at 1004.

The Seventh Circuit found these incidental contacts, despite their *de minimis* effect on interstate commerce, were sufficient for federal control under the Commerce Clause. *Id.* The court did not explain how any or all of these contacts of Apna Ghar exerted any effect on interstate commerce. *Id.* It merely inferred that these incidental contacts were matters "affecting commerce" and (citing *Wickard v. Filburn*, 317 U.S. 111), without discussion, found the aggregation doctrine and the class of activities rule applicable. *Johnson*, 330 F.3d at 1004. The court found the "'affects commerce' hurdle is very low" and that Apna Ghar's incidental contacts with interstate commerce sufficed to confer federal jurisdiction.

Basing federal jurisdiction on such indirect and remote contacts with interstate commerce pushes the authority of the federal government "to such an extreme as to destroy the distinction, which the Commerce Clause itself establishes, between commerce 'among the several states' and the internal concerns of a state." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30; 41 (1937). Over 60 years ago, this Court held in *Wickard* that Congress can constitutionally regulate any activity under the Commerce Clause where, despite its wholly

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[4] The laundry list of routine activities incidental to Apna Ghar's primary activity cited by the Seventh Circuit in support of its holding was: telephone calls and contacts with out-of-state sources; purchases of goods that moved at one time in interstate commerce; occasional out-of-state advertising and solicitation of support. *Johnson*, 330 F.3d at 1004.

intrastate character and attenuated effect when taken separately, "taken together with that of many others similarly situated" such activity can be said to exert an effect on interstate commerce. *Wickard*, 317 U.S. at 128-29. This principle of looking at a "class of activities as a whole" instead of at the activity itself provides no stopping point for the aggregation doctrine because it allows Congress to exercise unlimited power over any activity, no matter its commercial character, intrastate nature or direct effect on interstate commerce. *Lopez*, 514 U.S. at 600-01 (Thomas, J. concurring).[5] Indeed, the heart of the aggregation doctrine is that Congress can regulate because of the effects a wholly intrastate activity may inferentially exert on interstate commerce. *Wickard*, 317 U.S. at 128-29.

Morrison and *Lopez* refused to authorize federal control over intrastate activities under the Commerce Clause based on chains of inferences leading eventually to an effect on interstate commerce. *Morrison*, 529 U.S. at 614-17; *Lopez*, 514 U.S. at 567-68. Unfortunately, this Court did not define the limits of the aggregation doctrine and its "class of activities" or "regulation in general" rationale. *Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 560-61. The lack of definitive limits on the aggregation doctrine allowed the Seventh Circuit and, as discussed below, other federal circuits to circumvent *Lopez*'s and *Morrison*'s strong holding that the Commerce Clause is not a plenary grant of power to Congress to control any intrastate activity it chooses so long as Congress can "aggregate" it with similar activities in other states to posit an "effect" on interstate

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[5] *See, e.g., Scarborough v. United States*, 431 U.S. 563 (1977) (upholding federal felon-in-possession of a firearm statute based solely on the fact that the gun possessed moved at some distant time in the past in interstate commerce).

commerce.[6] This conflict provides ample reason for the Court to grant certiorari in this case.

II

THIS COURT SHOULD GRANT THE WRIT TO RESOLVE THE CONFUSION AND CONFLICTS AMONG THE FEDERAL CIRCUITS GENERATED BY THE CLASH BETWEEN THE AGGREGATION DOCTRINE AND THE LIMITED SCOPE OF THE COMMERCE CLAUSE

The lack of definitive boundaries for federal control of wholly intrastate activities under the Commerce Clause has lead to disarray among the federal circuits. Some courts apply the aggregation doctrine to wholly intrastate activities in an expansive manner, contrary to *Lopez* and *Morrison*. In other cases, courts faced with nearly identical facts reach directly conflicting results because of the discord between the finite power granted under the Commerce Clause and the infinite control the aggregation doctrine authorizes. *Cf. Lopez*, 514 U.S. at 567-68; *id.* at 599-601 (Thomas, J. concurring).

Recently, the Fifth Circuit dismissed *Lopez*'s and *Morrison*'s teaching that Congress' Commerce Clause power must have definite limits in order to prevent federal overreaching into wholly intrastate, noncommercial activities. In *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003) (petition for rehearing pending), the Fifth Circuit found federal control of tiny, cave-dwelling spiders and beetles appropriate under the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, even though they existed only in Texas, had no commercial value, were subject to no trade and therefore

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[6] *See* Arthur B. Mark, III, United States v. Morrison, *The Commerce Clause and the Substantial Effects Test: No Substantial Limit on Federal Power,* 34 Creighton L. Rev. 675, 730-38 (2001) (analyzing how *Morrison* preserved the aggregation doctrine while at the same time finding the Commerce Clause granted Congress limited power).

exerted a negligible effect on interstate commerce. *GDF*, 326 F.3d at 637-38. Indeed, without showing that any economic effect whatsoever could result from a "take" of the listed species, the Fifth Circuit found *Wickard*'s aggregation doctrine applicable. *Id.* at 638-41.

The Fifth Circuit explicitly relied on the aggregation doctrine preserved in *Lopez* and *Morrison* to find that the aggregate nationwide effects of an activity that "took" any endangered species justified federal control over those activities. *Id.* at 630-32, 641. Such a broad use of the aggregation doctrine resembles the "costs of crime" argument rejected by this Court in both *Lopez* and *Morrison*.[7] *Lopez*, 514 U.S. at 564-68; *Morrison*, 529 U.S. at 614-19. Such an unwarranted extension of *Wickard* fails to respect both the Constitution and this Court's holdings that the Commerce Clause does not grant to Congress a general police power. *Cf. Morrison*, 529 U.S. at 617-19; *Lopez*, 514 U.S. at 567-68.

The need for definitive boundaries on the scope of the commerce power is also apparent in recent circuit court decisions regarding federal criminal laws. In *United States v. Holston*, the Second Circuit considered whether 18 U.S.C. § 2251(a) was an unconstitutional use of the commerce power, where the government's case depended solely on the fact that the defendant produced child pornography using "materials that [had] been mailed, shipped, or transported in interstate or foreign commerce by any means. . . ." No. 02-1292, 2003 WL

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[7] The "costs of crime" argument relies on a ripple-effect logic. In both *Lopez* and *Morrison*, the government argued that under the aggregation doctrine, Congress could regulate gun possession in schools and gender-motivated violence, respectively, because of the aggregate effects of those crimes on the national economy. *Lopez*, 514 U.S. at 564-65; *Morrison*, 529 U.S. at 612-14. This Court rejected such a broad use of the aggregation doctrine in both cases in order to preserve the line between what is "truly national and truly local." *Lopez*, 514 U.S. at 566-68; *Morrison*, 529 U.S. at 617-19.

22053060, at *2 (2d Cir. Sept. 4, 2003). Holston had recorded sexually explicit images of 10- and 14-year-old girls using equipment that had once moved in interstate commerce. *Id.* at *1.

The Second Circuit found that despite the wholly intrastate nature of Holston's acts, Congress could regulate because possession or production of child pornography in the aggregate substantially affected interstate commerce. *Id.* at *6. The court found that Holston's "homegrown" pornography was the equivalent of the homegrown and consumed wheat in *Wickard*. *Id.* Like Wickard's wheat, Holston's pictures threatened to enter the market and theoretically affect the supply and demand for child pornography. *Id.* *See Wickard*, 317 U.S. at 128 ("[W]heat overhangs the market and if induced by rising prices tends to flow into the market and check price increases"). Further, the *de minimis* effects of Holston's acts alone on interstate commerce did not bar his prosecution for lack of an interstate commerce connection because the statute regulated a general class of activities that Congress concluded substantially affects interstate commerce. *Holston*, 2003 WL 22053060, at *6.

By contrast, in *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003), the Ninth Circuit dismissed an indictment under the federal child pornography statute, 18 U.S.C. § 2252(a)(4)(B). *Id.* 323 F.3d at 1133. The court refused to apply the aggregate effects test to the intrastate possession of child pornography that the Second Circuit applied in *Holston*. *Id.* at 1120-23. Instead, the Ninth Circuit focused solely on the effect the conduct of the defendant exerted on interstate commerce. *Id.* Focusing on the activity of the defendant, and not the general, nationwide effects of a "class" of crime, the Ninth Circuit held the federal government could not constitutionally control McCoy's intrastate possession of visual depictions of children in sexually suggestive poses. The court found McCoy created the images intrastate; did not receive the images in

interstate commerce; and did not intend to sell, distribute or exchange them. *Id.* at 1129-30. Further, the use of camera and film that had previously been shipped in interstate commerce was not enough, by itself, to demonstrate any effect on interstate commerce. *Id.* at 1125-26.

The Ninth Circuit applied *Lopez* and *Morrison* to find that McCoy's conduct itself was too attenuated from interstate commerce to justify federal control. *Id.* at 1129. This decision is in conflict with *Holston*, which found federal control of a wholly intrastate crime proper based on a "'general regulatory statute.'" *Holston*, 2003 WL 22053060, at *6. The fact the Second and Ninth Circuits could reach contradictory conclusions applying *Lopez* and *Morrison* to similar fact patterns demonstrates the need for this Court to resolve the continuing conflict between the aggregate effects/class of activities doctrine and the limited grant of power conferred on Congress under the Commerce Clause.

Another pair of circuit decisions reached opposing conclusions regarding an intrastate activity's effect on commerce under the federal arson statute, 18 U.S.C. § 844(i). In *United States v. Lamont*, 330 F.3d 1249 (9th Cir. 2003), the Ninth Circuit found a church's effects on interstate commerce were not substantial and therefore the federal arson statute could not apply. *Id.* at 1259. Although the church had members from five states; received utility and insurance services from out-of-state providers; received donations from out-of-state residents; purchased goods from out-of-state; and received and distributed publications out-of-state, these contacts were too attenuated from interstate commerce for Lamont's arson of a church to exert a substantial effect. *Id.* at 1253-57.[8]

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[8] *Cf. Jones v. United States*, 529 U.S. 848, 857-60 (2000) (limiting reach of federal arson statute to avoid addressing whether statute violated the Commerce Clause); *United States v. Ballinger*, 312 F.3d

(continued...)

The Ninth Circuit cited *Morrison*'s command that the courts maintain the limited scope of the Commerce Clause in order to prevent the federal government from exercising a general police power over Americans as one of the reasons for its decision. *Id.* at 1252.

By contrast, in *United States v. Rayborn*, 312 F.3d 229 (6th Cir. 2002), the Sixth Circuit found a church's effects on interstate commerce were substantial and therefore the federal arson statute applied. *Id.* at 235-36. The court avoided applying the constitutional analysis called for by *Lopez* and *Morrison* to determine whether an activity has a substantial effect on interstate commerce. *Id.* at 232-36. Instead, it found the church had a substantial effect on interstate commerce because its congregation traveled from three nearby states to attend services; it received donations from out-of-state contributors; and it purchased goods that had once traveled in interstate commerce for picnics and church services such as funerals. *Id.* at 234-36.

Legal scholars recognize lower federal courts continue to use the aggregation to uphold federal control over wholly intrastate activities with minimal or attenuated connections to interstate commerce.[9] Post-*Lopez* and post-*Morrison* decisions of the federal courts reflect a determined resistance to

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[8] (...continued)
1264 (11th Cir. 2002) (holding that 18 U.S.C. § 247 could not apply to five church burnings that all occurred in Georgia, either separately or in the aggregate because each church's connections to interstate commerce were too attenuated).

[9] Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 Ark. L. Rev. 731 (2003) (arguing that *Lopez* and *Morrison* will not seriously effect the current, extensive reach of federal power because the Court did not limit the aggregation doctrine and other devices for extending federal power over wholly intrastate activities).

respecting the limited grant of federal power under the Commerce Clause by purposely under reading *Lopez* and *Morrison*.[10] Further, the lack of definitive boundaries to the scope of the Commerce Clause power allows courts to uphold continued federal control of intrastate, noncommercial activity with tenuous links to interstate commerce.[11] Unless this Court resolves the clash between the aggregation doctrine and the limited grant of power explicit in the Commerce Clause, it will continue to generate disarray among the federal circuits. Thus, this Court should grant the writ.

CONCLUSION

In *Lopez* and *Morrison*, this Court held the Commerce Clause granted Congress only limited power in order to prevent the federal government from exercising a general police power. However, that directive conflicts with this Court's continued approval of the aggregation doctrine. Some lower federal courts continue to use the aggregation doctrine to extend federal control over any activity regardless of its intrastate or commercial character or the degree of its effect on interstate commerce. Others have rejected the aggregation doctrine, finding to apply it would destroy the "distinction between what

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[10] Glenn H. Reynolds & Brannon P. Denning, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 Ark. L. Rev. 1253 (2003) (analyzing what effect *Morrison* had on lower court's willingness to strike down federal laws or their application on Commerce Clause grounds); *Lower Court Readings of* Lopez, *Or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 Wis. L. Rev. 369 (surveying lower court applications of *Lopez*).

[11] Kathleen Brickey, *Crime Control and the Commerce Clause: Life After* Lopez, 46 Case W. Res. L. Rev. 80 (1996) (noting *Lopez* left intact precedents that allow federal control of wholly intrastate crimes with tenuous links to interstate commerce).

is truly national and what is truly local" the Commerce Clause seeks to preserve. *Lopez*, 514 U.S. at 567-68.

As James Madison wrote, and as this Court recently reaffirmed, the " 'powers delegated by the . . . Constitution to the federal government are few and defined.' " *Lopez*, 514 U.S. at 552 (quoting The Federalist, No. 45 at 292-93). States possessed control over all else not expressly ceded to federal control. *Lopez*, 514 U.S. at 553. The Framers' purpose in dividing power between federal and state governments was to maximize liberty by preventing extensive central control over the lives of Americans. *Id.* The continued preservation of the aggregation doctrine subverts this purpose, as demonstrated by the addled application of the aggregation doctrine among the federal circuits. *Cf. id.* at 599-601 (Thomas, J. concurring). Thus, this Court should grant Apna Ghar's petition for a writ of certiorari, to resolve conflict and confusion among the lower federal courts and to preserve the "promise of liberty" explicit in the Constitution's division of power among the federal government and the states.

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